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ABSTRACT

Under previous copyright legislation and jurisprudence, medical, and to a lesser extent, educational professionals, were afforded broad discretion under the judicially created fair use doctrine. The Copyright Act of 1976 creates a statutory definition of fair use and prescribes a test to be used in determining when a use is "fair" and when it is infringement. Central to this test is "impact of potential market value" of the material. Biomedical communication involves material with a very high unit cost which is not offset by anything approaching mass distribution. There is no special exemption for, or understanding of, biomedical communication in the new law, with the result that the potential for a restrictive impact is great. Five references are cited. (Author/CHC)

# THE NEW COPYRIGHT LAW: IT'S IMPACT ON BIO-MEDICAL COMMUNICATION



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LEGAL historians can trace the concept of 'copyright' back for several hundred years. Copyright stems, as does so much of our jurisprudence, from the English Common Law traditions on which the Constitution of the United States is based. In the United States, copyright extends from Article One, Section 8 of the Constitution which empowered Congress..., "to promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries...."

The Congress enacted the first copyright law in 1790. In 1909 a revised copyright law was passed. This is essentially what we had to work with until the Copyright Law of 1976 was legislated. 1909 was an unfortunate year for the establishment of regulations for copyright. Although the great age of American inventing had been going on for several decades, the nation was just barely looking towards the start of the age of electronic communication. Motion pictures had existed for several years, still photography for almost a century, phonorecords for several decades. However, radio communication still consisted -- for the most part -- of ships at sea sending dots and dashes; television was an untested theory, audio home recording devices were unknown, and, of course, there was no such thing as photocopying.

This law, with no statutory definition of 'fair use', has lasted up to the time where 'xerox' is more than just a word; it's a noun, verb, adjective, and adverb. Although practically obsolete at birth, the Copyright law of 1909 lived for almost 70 years and has made few friends in its lifetime.

After approximately 20 year's work, Congress has revised the copyright laws. We are now experiencing the transition between the Act of 1909 and the Act of 1976. On January 1, 1978, there will exist only one copyright statute, Public Law 94-553.

Many of the familiar aspects of the old law will remain. Copyright will continue to be secured by authors, inventors and 'creators' of works. The legitimate subject areas for copyright will also remain the same. What may not be copyrighted also remains the same: concepts, ideas, systems, methods, principles of operation, procedures, etc. Copyright never secured for such material, rather the author-creator secures protection for the manner

in which he or she 'presents' the material. The new law also re-enacts the principle of copyright-for-hire. Copyright-for-hire covers work prepared by an employee during the normal course of his occupation, or a work specifically commissioned by another source. In these cases the right to secure copyright is retained by the employer or commissioner in lieu of specific written authorization to the contrary. Although it is not uncommon that this right be waived by the employer, the law can only be satisfied by contractual permission, not by verbal understanding or 'encouragement'.

The Copyright Act of 1976 significantly alters the duration of copyrighted material. Material copyrighted since the formal enactment of the Public Law 94-553 is covered for the life of the copyright holder, plus 50 years. This automatically places all new copyrights into the estate of the copyright holder. (Under the old law, copyright was for 28 years with a one term renewal of 28 years on request of the author.) For works made 'for hire', the copyright extends for 75 years only. There are only 5 years from the time a work is published with the copyright notice, to apply for formal copyright protection.

Materials which were copyrighted under the 1909 law and are still in their first term (i.e. first 28 year period), will have to be renewed when the term expires. However, this renewal will last for 47 years. Materials in their second term, or 28-year period, will automatically gain an extension of 19 years in addition to the second term of 28 years. Materials that have already entered the public domain may not re-obtain copyright protection. However, if an existing contract allows for use of material for its second 28 year term, that contract will not endure for the period of the extra 19 years provided by the copyright law. The right to use the material for the additional 19 years reverts to the copyright holder.[2]

## What Is and Is Not 'Fair Use'

The law and the Constitution state that the copyright shall give the holder 'exclusive' rights to his material for a limited time. Why debate the so-called 'fair use' concept? The

law of 1909 made no mention of fair use. This concept was created by the courts. The general idea behind fair use was that critics, commentators and teacher-researchers could make use of certain parts of other peoples' work in the legitimate interest of promoting science, the arts and education. The courts' justification for what amounts to 'amending' an act of Congress was stated Constitutional reason for having copyright, "to promote Science and the useful Arts". It was the opinion of various courts that to take the word 'exclusive' literally would hinder rather than promote the progress of the nation. Yet, in creating the doctrine of fair use, the courts indicated that decisions made on a case-by-case basis of what was fair use and what was infringement, only begged the issue until Congress could state what it meant by fair use. In other words rather than attempting to establish universal rules, the courts were in effect saying, "this is all right for now," and "for the time being this is infringement". As one legal scholar put it, fair use became something "somewhere in the hinterland between the broad avenue of independent creation and the jungle of unmitigated plagiarism".3 Under the old law, a frequently legitimate defense in an infringement suit would be to claim that the use of the work was non-commercial in nature. This defense was especially strong if one worked for a nonprofit institution such as a school or hospital.

Under the old law, biocommunications was offered the widest possible latitude by the courts. One case involved the National Institutes of Health and the National Library of Medicine. They were in the business of systematically photocopying, on request, entire journal articles. In 1970 alone, such copying amounted to 179,490 possible cases for legal action. The Williams and Wilkins Company sued, claiming wholesale infringement. The Company won an initial decision stating that the doctrine of 'fair use' did not apply in their case. However, on appeals, the NIH and NLM were upheld. In its decision the Court sounded a warning "... since the problem of accomodating the interests of science with those of the publishers (and authors) called fundamentally for legislative guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm on science and medicine".4

Now that Congress has acted, fair use has a statutory definition. The concept of fair use does not apply to audiovisual materials. Some would argue that taking a segment of a movie is the equivalent of quoting a paragraph from a book. The law, however does not take that view. Extracting a sequence from a movie is considered to be an attempt to capture the essence of the movie and this can rarely be done without damaging the value of the entire copyrighted work. Obviously, there can be no 'fair use' of a single picture or graphic work. Copying pictorial or photographic material using a different medium, i.e. having an artist copy a photograph in pen and ink will not avoid the charge of infringement.

The new law is very specific about the use of photocopying machines and other devices that exist now or may be 'developed in the future'. On viewing the rules with their specifications on numbers of copies, whether or not they are available at fair market value etc., the reader will immediately want to make a comparison between this law and Prohibition in terms of potential enforcement. The analogy would not be entirely invalid, however, as it would seem that the mass copying policy of the National Institutes of Health and the National Library of Medicine will again be reviewed. It is true that under certain circumstances, multiple copying may be allowed, but prohibition exists as to it being 'systematic', 'directed from higher authority', and a substitution for regular purchases. Perhaps the most significant change in the fair use concept is one of the statuatory factors in determining whether or not infringement has occured. The courts now must assess "the effect of the use of the copy on the potential market for our value of the copyrighted work". The defense of noncommercial use, or nonprofit institution is no longer valid. Is your use to some degree denying someone the livelihood he may be entitled to from his work? You can harm the market value of someone's work while engaging in nonprofit activities just as well as if you were publishing or creating for profit. As the case history of the copyright law developes, this may well be one of the most significant sections of the entire law.

The Copyright Act of 1976 -- an Individual Law

When involved in the area of copyright and in reading the law with its list of rights, prohibitions, exclusions, etc., it must be remembered that when you obtain a copyright, these aspects of the law come with it. Rights under copyright are 'negotiable'. Many communicators will wonder how someone else can 'get away' with doing something which seems to be illegal. Of course, there's the possibility that such a person hasn't been caught yet, but the answer probably lies in a contractual arrangement which the user and the copyright holder have negotiated. Therefore, knowing that someone else is doing something doesn't mean you can do it. Conversely, finding out that someone else has been 'caught' doesn't mean you can't do it. It's a question of negotiated rights. Users of copyrighted material must bear in mind that once the author or creator has secured his copyright and placed one of the authorized symbols on his work, the responsibility to be aware of and abide by the regulations of the copyright act is an affirmative duty belonging to the potential user. An unsuccessful defendant may be assessed total court costs and legal fees of the plaintiff as well as assessment for damages.

Biocommunication -- A Potentially High Impact Area

Education in general and Biocommunication in particular have the potential to be high impact areas as we begin to look for the effects of the new copyright law. The reasons for this are numerous: 1) The Courts have always been lenient with people in medicine regarding fair use. 2) Certain practices which have received a temporary judicial approval now appear to be banned. 3) The noncommercial or nonprofit use of copyrighted material is an extremely poor defense, if applicable at all. 4) The production of biomedia with its large numbers of illustrations, slides, video tapes etc., make Biocommunication a high unit cost business. 5) The cost of such media is further increased by its lack of true 'mass distribution'. 6) The 'spirit' of the new law is clearly on the side of the copyright holders and 7) The courts have been waiting for Congressional guidance.

Institutions involved in large scale Biocommunication activity should consult with their legal staff to formulate and publish an institution-wide copyright and copying policy which should be endorsed by the board of trustees or regents. This will enable such operations to continue within the law. Hopefully it will also minimize conflicts within an institution between those who do not desire to spend their days in court and those who do not understand why things can't be like they always were. It is true that a legal history must now be built to go with this law, but this legal history will be built in the court room. The defendant's bench is not the forum of the biocommunicator.

## REFERENCES


1. Public Law 94-553, Section 102.

2. Duration of Copyright Under the New Law, Copyright Office Circular R15a, United States Government Printing Office, Washington, D.C., Dec. 1976.

3. Gishop, Arthur N.: Fair Use of Copyrighted Books, Houston Law Review, Vol, 2; 2 (Fall 1964) pp. 206-221.

4. Williams & Wilkins Co., v. United States, 487 F. 2d 1345 (Ct. Cl. 1973).

5. Time, Inc. v. Bernard Geis Associates, 293 F. Supp 130, 131-134.